STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

DALE L. DUVERNEY,MARY J. DUVERNEY,
LINDA MARIE SMITH, CAMMIE PENNINGTON,
CHARLOTTE F. AVERY, LYLE RICHARD ELLIS,
DOROTHY E. OWEN, DALE E. NEFF,
TONI OWEN ANDERSON, ELMER M. SHEPHARD,
CRAIG ROBIN CRANDELL, KAREN SUE SMITH,
ELIZABETH JEAN SEATON, SHARON BARNETT,
JAY P. BARNETT, CLETIS J. BISHOP,
WALTER H. BRUSCH, JR., GENE RAYMOND HOY,
JODY MANUEL SHEPHARD, SARAH Y. WATSON, OK
EDWIN A. BROWN, JILL ANN LANEY,
GLENN MCDANIEL, ROGER ALLAN OTT II,
ETTA NASH, HAROLD SPROWL and CORA GORDAN,
individual Michigan taxpayers and property owners
subject to the jurisdiction of BIG CREEK-MENTOR
UTILITY AUTHORITY,and TOWNSHIP OF MENTOR,
MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN
Plaintiff-Appellants

23163

APPL

vs.

Supreme Court Case Number:
Court of Appeals Case Number ~~230858~~
243866

BIG CREEK-MENTOR UTILITY AUTHORITY, a Michigan
Municipal Corporation, and TOWNSHIP OF MENTOR,
MICHIGAN, and TOWNSHIP OF BIG CREEK, MICHIGAN,
Jointly and Severally,
Defendant-Appellants

3/4

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APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

STATE OF MICHIGAN
IN THE SUPREME COURT

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APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT OF QUESTION INVOLVED

Do the mandatory connection charges for a sewer constitute a tax without a vote of the people contrary to Article 9, Section 31 of the Michigan Constitution pursuant to the test set forth in Bolt v City of Lansing, 459 MI 452 (1998)?

Court of Appeals Answer: NO

Plaintiffs -Appellants Answer: YES

Defendants' Answer: NO

APPLICATION FOR LEAVE TO APPEAL

The plaintiff-taxpayers, by their counsel, SCHMID & SCHMID PLLC, apply to this Court pursuant to MCR 7.302 for Leave to Appeal from an Order of the Court of Appeals dated January 10, 2003 (Exhibit H to this application). In support of this Application, plaintiff-taxpayers will show that:

1. The Issues Raised in this Application are of Significant Public Interest and the Case is Against the State and Several State Agencies (MCR 7.302(B)(2)).

The issues raised in this application are of significant public interest and this case is against the Big Creek-Mentor Authority and Big Creek and Mentor Townships, all subdivisions of the state. The significant public interest is that the Court of Appeals' January 10, 2003, misinterprets Const. 1963 art 9, §32.

2. The Rulings of the Court of Appeals on the Issues Raised in this Application are Clearly Erroneous and Will Cause Material Injustice, and are in direct conflict with Supreme Court precedent set forth in Bolt v City of Lansing, 459 Mich 452 (1998). (MCR 7.302(B)(5))

The Court of Appeals' decision of January 10, 2003, is clearly erroneous and will cause material injustice. The effect of the Court's ruling is to prevent the property owners subject to mandatory connection charges to exercise their right to vote thereon, despite the provisions of Michigan Constitution 1963 art 9, Sec §32, commonly referred to as the "Headlee" Amendment, and the Supreme Court decision in Bolt v City of Lansing, 459 Mich 452 (1998).

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Proceedings

Plaintiffs - Appellants filed a complaint as an Original Action in the Court of Appeals to enforce Article IX, Section 31 of the State Constitution of 1963, as amended (Attached Exhibit B). The complaint alleged facts to support the conclusion that the "Big Creek-Mentor Public Water and Sewer Ordinance", by ordering mandatory connection to, and payment for, capitalization and maintenance of a previously established sewer system is unconstitutional because the involuntary *"user fees"* imposed constitute a new tax without a vote of the people effected by the charges.

Article IX, Section 32 of the State Constitution of 1963, as amended, provides original jurisdiction in the Michigan Court of Appeals to enforce tax limitations imposed on state and local government by approved voter initiative amendment to the Michigan Constitution (Attached Exhibit C). The Michigan Legislature has implemented Article IX, Section 32 of the State Constitution of 1963, as amended, by enacting the provisions of MCL 600.308(a), which specifically gives the plaintiff taxpayers the right to commence this original action in the Michigan Court of Appeals to enforce Article IX, Section 31of the State Constitution of 1963 (Attached Exhibit F).

Plaintiffs-Appellants are individual Michigan Taxpayers as specified by Article IX, Section 32 of the State Constitution of 1963, as amended, and MCL 600.308(a). All plaintiffs are individual Michigan taxpayers and property owners subject to the Jurisdiction of the Big Creek-Mentor Utility Authority, and Township of Mentor, Michigan, and/or the Township of Big

Creek, Michigan. All are owners of residential structures located within 200 feet of an existing sewer in Mio, Michigan, and have recently been warned by their respective townships to connect to the sewer or face criminal penalties.

Defendants are local units of government as defined by Article IX, Section 33 of the State Constitution of 1963, as amended (Attached Exhibit D), which states in pertinent part, that ' "Local Government" means any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government." Defendant Big Creek-Mentor Utility Authority (hereafter referred to as "Authority"), is a Municipal Corporation formed between defendants Big Creek Township and Mentor Township in 1992, both political subdivisions of the state.

Plaintiffs - Appellants' Complaint in the Court of Appeals stated a cause of action to enforce Article IX, Section 31 of the State Constitution of 1963, as amended (Exhibit B). The complaint alleged that the "Big Creek-Mentor Public Water and Sewer Ordinance #21" orders mandatory connection to a previously established sewer system, and involuntary payment for capitalization and maintenance thereof. Enactment of the Big Creek-Mentor Public Water and Sewer Ordinance, and efforts to enforce demands for payment of involuntary user fees, are unconstitutional because the involuntary self-styled "*fees*" imposed are in fact a new tax without a vote of the people.

In dismissing the original action in the Court of Appeals, the Court Order (Attached Exhibit H) which is the subject of this Appeal found plaintiff's pleadings "...wholly insufficient to persuade this court that the challenged charges constitute a tax". In an original action in the

Court of Appeals, if there are disputed facts, and the court sees fit to proceed to formal hearing, then plaintiffs can offer proof of allegations and the Court can develop a factual record by referral to a Circuit Court and/or decide the case after a full hearing on the merits. Otherwise, the court may deny relief according to MCR 7.206(3), below:

> "MCR 7.206(3) *Preliminary Hearing.* There is no oral argument on preliminary hearing of a complaint. The court may deny relief, grant peremptory relief, or allow the parties to proceed to full hearing on the merits in the same manner as an appeal of right either with or without referral to a judicial circuit or tribunal or agency for the taking of proofs and report of factual findings."

Facts

On September 17, 2001, the defendants Mentor Township and Big Creek Township together, and in conjunction with defendant Big Creek-Mentor Utility Authority, adopted the Big Creek-Mentor Public Water and Sewer Ordinance #21 (Exhibit A). The ordinance adopted by the defendants mandates all residential structures within 200 feet of the "existing sewer" to connect to said sewer system (Section 4(h) of the Big Creek-Mentor Public Water and Sewer Ordinance #21 attached as exhibit A). There are no exceptions, nor consideration allowed with respect to the viability of the fully functioning septic systems that presently service the parcels owned by plaintiffs, or any other reason relating to the particular needs or conditions of the parcels owned by plaintiffs.

The Big Creek-Mentor Public Water and Sewer Ordinance #21 further mandates payment

of connection charges (See Section 4(a) of the Big Creek-Mentor Public Water and Sewer Ordinance attached as exhibit A). Involuntary payments include a connection fee of over $1900.00 for each parcel (according to the demand letters attached as exhibit G), and continuing service fees, which payments will go towards debt service and other capitalization charges in addition to continuing maintenance costs.

The ordinance further provides that non-payment of the charges that the plaintiffs are forced to incur will result in involuntary liens against the property that are subject to foreclosure or forfeiture, at the Authority's option and in the same manner as property taxes are collected (See Section 4(c) of the Big Creek-Mentor Public Water and Sewer Ordinance #21 attached as exhibit A).

The Ordinance further provides criminal and civil fines, penalties, and injunctions for failure to comply with the ordinance, including $100 a day fines and up to 90 days in jail. (See Section 5 of the Big Creek-Mentor Public Water and Sewer Ordinance attached as exhibit A).

The Big Creek-Mentor Public Water and Sewer Ordinance #21 forces plaintiff taxpayers to involuntarily submit to payment of capitalization *and* use expenses, which are neither wanted nor needed, without first obtaining voter approval. Plaintiffs, and others similarly situated, wish to maintain the status quo and continue using presently viable drain fields.

The defendants claim that MCL 333.12573 (attached as exhibit E) authorizes a township to mandate connections to existing sewers at the township's option. The statute allows, but does not require, townships to make sewer connections mandatory for structures within 200 feet of and existing sewer. The defendants' enacted the Big Creek-Mentor Public Water and Sewer Ordinance #21 as a discretionary act of the townships and the Authority, and not because they were required by law to compel anyone to connect to their existing sewer.

Defendants, in a concerted effort to enforce mandatory connection and involuntary payment provisions of the Big Creek-Mentor Public Water and Sewer Ordinance #21, have sent written demand letters to plaintiffs, and other property owners similarly situated, mandating connection to the sewer and payment of charges and fees, and threatening fines up to $100.00 a day. According to the letters sent to plaintiffs, "The Ordinance is necessary to ensure that all people within the sewer district contribute to the success of the public sewer system." (see attached Exhibit G)

Big Creek-Mentor Public Water and Sewer Ordinance is a revenue raising ordinance designed to defray capital expenditures for public works that provide public benefits far in excess of any particular benefit to the individual property owner, who does not benefit at all from an unnecessary sewer service.

Mandatory connections were not part of the equation when the Authority was formed, or thereafter when the defendants-appellants borrowed money from the Federal Government and in 1997 built a sewer system in Mio, all in concert with one another and without a vote of the persons serviced by the sewer, the voters within the "Authority", or any vote within Mentor and Big Creek Townships.

ARGUMENT

The "Big Creek-Mentor Public Water and Sewer Ordinance #21" orders mandatory payment of connection charges to the capitalization and maintenance costs of an existing sewer system that should never have been built. The sewer system was put in over 4 years ago with borrowed money from the Federal Government and without a vote of the people. It was hoped that Mio residents would use the system, but the residents did not want or need the system; there was no established soil drainage or contamination problem, and there were not enough potential users to defray the huge capital construction loans and the maintenance fees of a modern municipal sewer system. Defendants-Appellants Brief in the Court of Appeals says that there are *only 635 total properties* subject to the sewer system. The small number of persons who voluntarily connected to the sewer system was so low that it created a financial crisis which led the Authority and the townships to enact the Big Creek-Mentor Public Water and Sewer Ordinance #21 in attempt to force more people to help absorb the high cost of the system. By defendants' own admission, according to the letters sent to plaintiffs, "The Ordinance is necessary to ensure that all people within the sewer district contribute to the success of the public sewer system."(see attached Exhibit G). Now plaintiffs, who have fully functioning drain fields, are being forced to participate in the use of a sewer they don't need and can't afford as a means to force their *financial* participation in the new sewer system without any vote of the persons within the "Authority" or any vote within Mentor and Big Creek Townships.

Big Creek-Mentor Public Water and Sewer Ordinance #21 is a revenue raising tactic which

has no regulatory purpose. It disguises payment obligations, which are far in excess of any benefit received, as user fees in order to avoid tax limitation provisions of the constitution, but it in fact is a new tax not approved by the voters.

Because the mandatory connection fees and service fees are in fact compulsory taxes and not legitimate user fees, the Big Creek-Mentor Public Water and Sewer Ordinance #21 violates Article 9, Section 31 of the Michigan Constitution, as amended, (the so-called Headlee Tax Limitation Amendment, attached hereto as Exhibit B), which prohibits local governmental from imposing new taxes without voter approval and which states, in pertinent part, that:

"Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon."

Plaintiffs' unique and valuable property rights, and even their personal liberty, are placed at risk by the illegal Big Creek-Mentor Public Water and Sewer Ordinance, and plaintiffs and others similarly situated will suffer serious immediate and irreparable harm if the defendants are allowed to enforce the ordinance. It contains criminal sanctions, including jail. It subjects plaintiffs to injunctions, and it imposes payment obligations that are subject to collection in the same manner as property taxes are collected, which could result in the forfeiture of a persons home in the event they could not afford to pay for connection to a sewer they did not need.

The ordinance, adopted by the defendants, mandates all residential structures within 200 feet of the "existing sewer" to connect to said sewer system, without exception or consideration of the viability of the valuable septic systems that presently service the parcels owned by plaintiffs (Section 4(h) of the Big Creek-Mentor Public Water and Sewer Ordinance) or any other reason

relating to the particular parcels owned by plaintiffs.

MCL 333.12573 (attached as exhibit E) , part of the Michigan Public Health Code, authorizes a township to mandate connections to existing sewers at the township's option. The statute purports to allow, but does not require, townships to make sewer connections mandatory for structures within 200 feet of and existing sewer. This statute, like all other statutes, is subservient to Michigan's Constitution. The defendants cannot use a mere statute as a cloak to protect them from the fiscal constraints placed upon them by the ultimate authority of the people of Michigan as expressed in our Constitution.

Masked as "user fees", the fees and costs of connection to the existing Big Creek-Mentor Public Sewer constitute the levy of a new tax without a prior vote of the people. Payment is not voluntary under the Big Creek-Mentor Public Water and Sewer Ordinance. The coerced payments are applied to the capital project, and the coerced connection to the sewer is of no particular benefit at all to persons such as plaintiffs, who have viable drain fields.

Article 9, Section 31 of the Michigan Constitution, as amended, prohibits imposition of new taxation not approved by voters, and has been interpreted by the Michigan Supreme Court in Bolt v City of Lansing, 459 Mich 452 (1998), to prohibit local governments from forcing involuntary submission to obligations called user fees, that are in fact the functional equivalent of taxes, without a vote of the people. The Bolt case squarely forbids the practice to raising revenue in the name of user fees, and it forces municipalities to seek the consent of those who would be taxed when exacting new money from people. The Big Creek-Mentor Public Water and Sewer Ordinance is precisely the sort of government coercion that Tax Limitation intended to stop.

The essence of Tax Limitation is consent. By limiting local governments to the taxes that

they were authorized to levy at the time of ratification in 1978 of the successful Headlee Tax Limitation Amendment, a Ballot Initiative Amendment to the Michigan Constitution, the people secured for themselves the absolute right to be free from new municipal expansionism not directly or indirectly consented to. This consent can be indirect by plebiscite, the general consent of the taxpayers being determined by majority vote. Under Headlee, only voter consent in a democratic election can give the government the awesome power to compel a person to pay new taxes for the general expansion of government. Direct consent can be established by the voluntary use and enjoyment of special municipal services by a person who agrees to pay a legitimate user fee for that special benefit not otherwise conferred on the rest of the public. If a person wants to support expansion of a municipal enterprise not part of the general tax base, and will assume the financial responsibility of consideration, then they may freely consent to payment for a promised special benefit and thereafter be held to task for bargained for obligations. Unless a person has the right to refuse to participate in accept some municipal benefit, they cannot be compelled to pay any new involuntary obligation for it unless that compulsion to pay be by the manifest will of the people in a direct democratic election.

This spirit of tax limitation was boldly asserted by the Supreme Court in the landmark Bolt case, supra, where the court clearly set the criteria for distinguishing a user fee from a tax for purposes of local tax limitation in the following passage:

> "Determining whether the storm water service charge is properly characterized as a fee or a tax involves consideration of several factors. Generally, a "fee" is "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Saginaw Co, supra* at 210;

Vernor v Secretary of State, 179 Mich 157, 164, 167-169; 146 NW 338 (1914). A "tax," on the other hand, is designed to raise revenue. *Bray v Dep't of State,* 418 Mich 149, 162; 341 NW2d 92 (1983).

> "Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed." [Citations omitted.]

In resolving this issue, this Court has articulated three primary criteria to be considered when distinguishing between a fee and a tax. The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. *Merrelli v St Clair Shores,* 355 Mich 575, 583-584; 96 NW2d 144 (1959), quoting *Vernor, supra* at 167-170. A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service. *Id.*; *Bray, supra* at 160. As was summarized in *Vernor,*

> To be sustained [as a regulatory fee], the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the

cost of issuing the license, and the regulation of the business to which it applies. [*Id.* at 167.]

In *Ripperger*, this Court articulated a third criterion: voluntariness. Quoting from *Jones v Detroit Water Comm'rs,* 34 Mich 273, 275 (1876), the *Ripperger* Court stated:

> "The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics' contracts, or against ships and vessels. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them."
>
> We believe the same reasoning that was applied to water charges in the above-mentioned case should be applied to sewage charges in the present case. [*Id.* at 686.]

Thus, one of the distinguishing factors in *Ripperger* was that the property owners were able to refuse or limit their use of the commodity or service." Bolt v City of Lansing, 459 Mich 452, 161 (1998)

After examining facts similar to the facts of this case in light of the above criteria, the Bolt case, *supra*, at page 169, concluded that the purported "user fee" was actually a tax and not a legitimate user fee. The court said,

> 'To conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as "services" and enacting a myriad of "fees" for those services. To permit such a course of action would effectively abrogate the constitutional limitations on taxation and public spending imposed by the Headlee Amendment, a constitutional provision ratified by the people of this state. In fact, the imposition of mandatory "user fees" by local units of government has been characterized as one of the most frequent abridgments "of the spirit, if not the letter," of the amendment."

As to the first factor in finding a user fee, that the fee must serve a regulatory purpose and not a revenue raising purpose, the Bolt court, *supra*, at 167, said the Lansing ordinance lacked a significant element of regulation, where

"The ordinance only regulates the amount of rainfall shed from a parcel of property as surface runoff; it does not consider the presence of pollutants on each parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters."

The Big Creek-Mentor Public Water and Sewer Ordinance also fails to have a significant regulatory purpose; it does not distinguish between parcels on the basis on soil type, contamination, bacteria levels, or other drainage difficulties. It is not designed to regulate conduct, only to raise revenue to help defray the cost of a sewer project that was just too big to sustain itself on the merits.

The charges imposed under the Big Creek-Mentor Public Water and Sewer Ordinance also are out of proportion with the benefit conferred. The plaintiffs all have functioning drain fields, and no value is conferred to them when they have no use whatsoever for a sewer system that is no more reliable and safe than the drain fields they already have. In addition, like in the Bolt case, the exorbitant hook up fees, and the fact that they are increased incrementally the longer a person refuses to connect to the Big Creek-Mentor Public Sewer, show that the ordinance does not fix costs on the basis of need or benefit, or amortize costs based on the physical life of the sewer, but instead has the goal of spreading cost over the fiscal life of the loan that financed the sewer project.

In Bolt, *supra*, at page 167, the court found that the ordinance failed "... to satisfy the third criterion-voluntariness- because the charge lacks any element of volition. One of the distinguishing factors of a tax is that it is compulsory by law". The threat of fines and jail, the force of injunction, and the power of the tax lein all combine to make the Big Creek-Mentor Public Water and Sewer Ordinance a model of coercion. There can be not doubt that the fees and charges imposed by the defendants are entirely lacking any element of voluntariness.

As to the power conferred by Section 4(c) of the Big Creek-Mentor Public Water and Sewer Ordinance (Exhibit A) to collect unpaid financial obligations in the same manner as

property taxes are collected, the court in Bolt, *supra*, at page 168, had this to say the Lansing storm sewer ordinance:

"...the fact that the storm water service charge may be secured by placing a lien on property is relevant. While ordinarily the fact that a lien may be imposed does not transform an otherwise proper fee into a tax, this fact buttresses the conclusion that the charge is a tax in the present case, where the charges imposed are disproportionate to the costs of operating the system and to the value of the benefit conferred, and the charge lacks an element of volition."

In a more recent case in the court of appeals, the court in Grahm v Kochville, 236 Mich App 141 (1999), at page 155, the court addressed the issue of voluntariness and decided that a connection fee was voluntary and not a tax.

> Plaintiff claims that the charge at issue is not voluntary because "the Ordinance in effect places a lien of $7,187.50 plus interest of 6% and an inflation cost of 5% on Appellees' property and would adversely affect any future sale of that property." However, we find no evidence of an involuntary lien in the ordinance. It appears that property owners in the new water district need pay only the amount of the previously enacted special assessment when they decide to connect to the water system. We see no evidence inhibiting property owners from retaining their current wells or drilling new wells, or in fact from using no water at all if the property is not developed and they do not require it. Thus, we conclude that the connection charge is voluntary-

those who decide to connect must pay the fee and those who choose not to connect are not required to pay the fee.

This rationale provides valuable contrast to the Big Creek-Mentor Public Water and Sewer Ordinance, which does not give residents the option to choose not to connect, and provides the functional equivalent of a tax lein which will attach without any consensual act by plaintiffs.

In conclusion, the Big Creek-Mentor Public Water and Sewer Ordinance is unconstitutional, and the obligations it forces on people are unenforceable. Defendants have consistently avoided submitting the will of the electorate, and consistently insisted that connection to the system was going to be voluntary. They built a big expensive municipal project in a very little town without ever giving any responsible consideration to the question of how they would pay back the loans they secured for its construction, and when financial reality hit they naturally look where they can for the money they need. This is understandable and their plight is regrettable, but their solution of compelling plaintiffs to pay for their mistake without submitting to a vote is illegal and should be stopped before someone is jailed or loses their property.

RELIEF SOUGHT BY PLAINTIFFS

Plaintiffs - Appellants respectfully seek such relief as it considers just and equitable under the circumstances, including but not limited to the following:

1. Grant this Application for Leave to Appeal

2. Upon Leave granted, that this Court reverse the Court of Appeals Order on the grounds that the offending connection charges constitute a tax, not a user fee.

3. Upon Leave granted, remand this matter to the Court of Appeals for the purpose of entering a judgement declaring that the offending connection charges constitute a tax, not a user fee, and ordering that they are null and void, or, in the alternative, order an evidentiary hearing on taxpayer's allegations in this regard to be held either before the panel or referred to the Circuit Court for the County of Oscoda, Michigan.

Dated this 26th day of January, 2003.

SCHMID & SCHMID, P.L.L.C.
Attorneys for Plaintiffs - Appellants

BY: _____
ALLAN C. SCHMID, P20004

BY: _____
GREGORY C. SCHMID, P37964

PLAINTIFFS' EXHIBITS

Big Creek-Mentor Public Water & Sewer Ordinance

An ordinance to regulate and control the construction, installation, extension, service connection, and operation of public water and sewer mains and public water and sewer service within the Township of Big Creek, to prescribe procedures for securing such public water or sewer service and the rates and charges for the same and to provide penalties for the violation of such ordinance regulations.

The Township of Big Creek, Oscoda County, Michigan Ordains:

Section 1: Title
This ordinance shall be known and hereafter cited as the Big Creek-Mentor Utility Authority Public Water and Sewer Service Ordinance.

Section 2: Definitions
1.1 R.E.U.- Residential Equivalency Unit: Term used to equate the approximate number of residences a commercial customers water usage will compare too.
1.2 Commercial User: Shall mean any user of the system other than a residential user, or buildings used primarily as a domicile.
1.3 Consumer: The person, or legal entity, served by or using water supplied by the Authority.
1.4 Cross Connection: Shall mean a connection or arrangement of piping or appurtenances through which water of questionable quality, wastes or other contaminants could possibly flow back into the water distribution system because of a reversal of flow.
1.5 Curb Box: A box or metal housing which encloses, protects and provides access to the curb stop.
1.6 Curb Stop: A valve for insertion in the service pipes, in size of three-fourths inch (3/4") to two inches (2") in diameter, inclusive, at or near the curb line.
1.7 Authority: Shall refer to the Big Creek-Mentor Utility Authority, a Michigan Municipal Corporation.
1.8 Authority Board: Shall mean the governing body of the Big Creek-Mentor Utility Authority.
1.9 Inspector: The Oscoda County plumbing inspector.
1.10 Lot: Shall mean a parcel of land occupied or intended to be occupied by a main building. A lot may or may not be specifically designated as such on public records.
1.11 Meter Pit: Any approved box or vault for the housing of a water meter.
1.12 Permit tee: A consumer or his agent receiving a permit from the Authority allowing a connection to be made to the water or sewer system.
1.13 Person: Shall mean any individual, firm, partnership, association, public or Private Corporation or public agency or instrumentality or any other entity receiving water and/or sewer service.
1.14 Premises: Shall mean each lot or parcel of land or building having any connection to the water and/or sewer system.
1.15 System: Shall mean the Public Water and/or sewer system.

1.16 Tap: The drilling and threading of an opening in a main for insertion of a corporation stop.

1.17 Water Connection: Shall mean the part of the Water Distribution System connecting the water main to a point terminating at a meter or meter pit or vault.

Section 3: Procedure

A. Application-

Any person, firm or corporation desiring public water or sewer service shall file an application therefore with the Big Creek-Mentor Utility Authority Board, containing the name and address of the applicant; a description of the land or premise to be serviced; the nature of the use anticipated for the water and the nature and/or type of waste to be discharged; the size of the water service connection pipes desired; the distance, if known, that the property is located from any existing public water or sewer main; the anticipated number of connections from the property contemplated in the foreseeable future; and whether the applicant wishes to pay in advance for the necessary water and/or sewer main extension or wishes to be included in a special assessment district for the payment of such cost over a limited period of years, together with interest and the administrative costs. Such application may take the form of a petition if several different persons are jointly interested in a particular project.

B. Special Assessment District-

In the event an applicant desires to proceed by installment payments and sufficient similar interest is disclosed on the application or petition by those property owners abutting the proposed water or sewer main, special assessment proceedings shall be instituted under Michigan Public Act 188 of 1954, as amended, (MSA Section 5.2770(51), etc.), to accomplish the requested project and if successful, the necessary system will be installed by the township following the completion of such proceedings and the obtaining of the necessary funds therefore.

C. Cash Deposit-

1.In the event an applicant desires to deposit with the township the total cost of the necessary project to furnish the requested water or sewer service, as determined the township board, the applicant may do so under a contract with the township, whereby the utility authority will supervise and/or construct the installation, in accordance with the design standards of the Big Creek-Mentor Utility Authority.

2.Any such contract may provide for reimbursement to the applicant of a portion of the project cost from connection charges collected by the utility authority from those connecting to the water or sewer main, who did not contribute to the initial cost thereof and are not the successors in title to any such contributor. Any such reimbursement shall be limited to a period of seven years following the completion of the project requested and any connections made thereafter shall not require any refund to the applicant. The amount of the connection charge shall be

in the discretion of the Big Creek-Mentor Utility Authority Board but should approximate the amount a connector would have paid on a benefit assessment basis, had his property been included in a water or sewer special assessment district created for the purpose of financing the project. The term "connection charge" as used in this ordinance pertains to a charge for the privilege of connecting premises to a water or sewer main and does not pertain to the construction cost of such connection.

3. The amount of refund, if any, to an applicant, per connection charge collected by the utility authority shall be specified in the contract with the applicant and shall be based upon a portion of the total project cost, computed on the cost per lineal foot of main installed; provided, however, that the total refund shall never be greater than the total cost of the project charged to the applicant.

4. No service connection nor main extension shall be allowed until the full charge has been paid to the Big Creek-Mentor Utility Authority in such an amount as is determined for each project by the utility authority board and the plumbing to be connected has been fully inspected and approved by the Oscoda County Building Department as in compliance with the building codes of the county. Such charges may be adjusted from time to time by the utility authority board to reflect changes in construction costs and to maintain a uniform charge between different current projects and special assessment districts. The Big Creek-Mentor Utility Authority reserves the right to install any required service connection or main extension, to subcontract the same to any private licensed contractor, or to permit the owner or owner's contractor to construct the same, provided that in such latter event, an inspection and supervision fee shall be paid by the applicant to the utility authority.

5. Any contract with an applicant shall contain, in addition to the foregoing the following:

a. A description of the district within which extensions or connections may be made to the system, entitling the applicant to a refund of a portion of their initial project cost.
b. A map disclosing the design of the system and the location of the mains, valves, fittings and all other accessories thereto which are to be installed.
c. A description of the area if any, within which no connection charges are to be made by the utility authority and no refunds are to be made by the applicant.
d. The amount and condition of any performance bond which shall be required in the event the installation is to be made by any one other than the utility authority, said performance bond shall be 150% of the total cost of the installation, All work shall be performed in a proper and workman like manner in accordance with the plans and specifications of the utility authority, The contractor shall provide satisfactory evidence of the fact the project is free of present and future liens of contractors, subcontractors and material men prior to the release of any performance bond which shall not be released prior to the expiration of 90 days from the final completion of work or supply of materials.

e. The amount and condition of any public liability and property damage insurance which shall be required to insure the townships and utility authority in the event the installation is to be made any one other than the utility authority, which shall be not less than $300,000 and $500,000 respectively.

f. The amount, if any, to be paid to the utility authority for administrative, legal and engineering cost or for the value of the availability of the water or sewer to which the property of the applicant is to be connected.

Section 4 Regulations

A. Sewer and water rates-
No free public sewer and water service shall be allowed and all those properties connected to a public water or sewer system shall be subject to the payment of such water and/or sewer rates and charges as shall be determined by the utility authority board.

B. Termination of service-
The utility authority shall have the right to terminate any water or sewer service to any premises within the utility authority when any delinquency exists with respect to any sewer or water payments due under this ordinance or otherwise, or where any premises does not comply with all the plumbing codes of the county and with any and all restrictions and limitations on the use of the particular water or sewer service imposed by the utility authority board.

C. Lien Rights-
All delinquent rates and charges for water and/or sewer service shall constitute a lien upon the premises served which shall be subject to foreclosure in the same manner as construction liens for non-payment, or after six months' delinquency, may be certified to the supervisor and assessing officer of the township annually, on or before March 1st of each year and entered by him upon the next tax roll against the property served, for collection in the same manner as the collection of taxes.

D. Turn On-
No person other than an authorized employee of the utility authority shall turn on or off any water service to any public or private premises at the curb box connection of said premises to the water main.

E. Water Meters-
All premises connected to a public water system shall be equipped with a public water meter, so located that all water entering the premises shall pass through such meter and be measured as to volume consumed for periodic computation of water and/or sewer charges.

F. Surplus Funds-
Any surplus funds collected from water or sewer service or from capitol improvements or extensions thereto shall be deposited into a water and sewer improvement revolving fund of the Big Creek-Mentor Utility Authority for use in further extending, improving, repairing, relocating and/or financing the public

water and/or sewer systems of the authority and/or repaying Big Creek and Mentor Townships for funds provided to the authority for operation and start up.

G. Unreasonable burden of sewage-
In the event any sewage discharged into the system imposes an unreasonable or additional burden upon the sewer system or the public primary or secondary treatment plants treating such sewage above that imposed by the average sewage entering such treatment plants the township shall have the option to impose an additional charge for such treatment against such customer to defray the additional cost of such treatment and any damage caused thereby; to require the customer to pre treat such sewage in such manner as the township may order before the same enters the public system; and to terminate sewer service to any premises which fails to comply with the foregoing.

H. Time Element-
Any premises within 200 feet of a public sewer main requiring sewage disposal service, shall be connected to the abutting sewer system within three years following the installation of said system or at such earlier time as the private sewage disposal system serving the premises requires replacement, a new field, new dry well, or new septic tank. Waste water and sewage disposal facilities in all buildings hereafter constructed shall be connected to the public sewer system if sewer mains are located in the abutting street at the boundaries of the site at the time of construction. New plats and subdivisions shall be developed with public water and/or sewer mains at the time of street construction if public water and/or sewer service is available at or near the boundaries of the plat or subdivision. The township board shall have the right to determine whether the service is sufficiently near to require such public service main installation.

I. Cross Connections-
No cross connections between any private water system and the township water system shall be allowed and no plumbing shall, at any time, be connected to the public system, which is in any manner connected or a part of any private system.

J. Water Service Connections-

1. General: where in the determination of the BCMUA board, public water service is reasonably available to a particular building in which water service is required, no new private wells shall be drilled to provide such water supply and such buildings shall be connected to the public water system, either at the time of construction, when the existing private well, if any, requires re-drilling, or at any time, in the determination of the District #2 Health Department, a health hazard exists or is fairly imminent from the existing water supply.
2. Size and Installation: All water service connections from the public transmission main to the required water meter shall not be less than 1 inch in size and shall be installed by the BCMUA which public highways exist and/or are disturbed by the construction and shall be installed at the expense of the property owner, computed to the center of the abutting highway. All such water service connections required by any customer to

be in excess of 1 inch in size shall be installed and furnished by said authority at the full expense of the customer requiring the same.

3. Under-Road Connections: In all residential subdivision developments hereafter commenced or extended where, in the determination of the township board, public water service is reasonably available and therefore required, one service connection of not less than 1 1nch in size shall be installed under the abutting right of way to the center of each lot or building site fronting on the opposite side of such right of way and terminating in the right of way, not more than seven feet from the property line.
4. Use of flush hydrants: No flush hydrant shall be used for any purpose other than fire protection without the prior approval of the utility authority.

K. Plans and permits- No public water or sewer main construction shall be commenced until all plans and specifications therefore have been submitted to and approved by the utility authority and all required state, county and municipal permits have been obtained.

L. District health department certificate- No public water mains shall be made or become operational until the water flowing there from has been certified as safe and free of any harmful contamination by the district health department and a written certificate attesting thereto is on file with the utility authority.

M. Preliminary deposit- All applications for public water or sewer service other than by petition for a special assessment district, requiring preliminary engineering analysis, review, and plans, shall be accompanied by a cash deposit with the authority in such amount as shall be determined by the utility authority board to be sufficient to cover the foregoing engineering work necessary to develop preliminary cost estimates for the proposed project.

N. Printed regulations- The utility authority board shall adopt and prepare for distribution to interested parties, separate rules and regulations governing the details of application, service connections, extensions, financing of improvements, and rates and charges for both public water and sewer service and shall have the authority to modify, enlarge, and amend the same from time to time to meet changing conditions and circumstances and to promote the health, safety, and general welfare of the township.

O. Utility Board- The Big Creek-Mentor Utility Authority will have authority to decide all questions which might arise in the interpretation, enforcement, and application of the within ordinance and to grant variances from the requirements thereof where, in its opinion, the health, safety, and general welfare of the township would not be thereby impaired and the spirit and purposes of the within ordinance would continue to be served.

SECTION 5: PENALTY

Any violation of the provisions of this ordinance shall constitute a misdemeanor, punishable by a fine of up to $100 and/or imprisonment in the county jail for up to 90 days. Each day that a violation continues to exist shall constitute a separate offense. The foregoing fines and penalties shall be in addition to the right of termination of public water and/or sewer service to a violator and the right to obtain injunctive relief in a court of law.

SECTION 6 SAVING CLAUSE: In any section, paragraph, clause or provision of this ordinance shall be held invalid for any reason, the same shall not affect the validity of any of the other provisions of this ordinance, which shall remain in full force and effect.
SECTION 7 EFFECTIVE DATE: This ordinance shall take immediate effect. All ordinances in conflict are hereby repealed.

ARTICLE IX
FINANCE AND TAXATION (EXCERPT)

§ 31 Levying tax or increasing rate of existing tax; maximum tax rate on new base; increase in assessed valuation of property; exceptions to limitations.

Sec. 31. Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.

The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment.

History: Add. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.

EXHIBIT B

ARTICLE IX
FINANCE AND TAXATION (EXCERPT)

§ 32 Suit to enforce sections 25 to 31.

Sec. 32. Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

History: Add. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.

EXHIBIT C

ARTICLE IX
FINANCE AND TAXATION (EXCERPT)

§ 33 Definitions applicable to sections 25 to 32.

Sec. 33. Definitions. The definitions of this section shall apply to Section 25 through 32 of Article IX, inclusive.

"Total State Revenues" includes all general and special revenues, excluding federal aid, as defined in the budget message of the governor for fiscal year 1978-1979. Total State Revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities. "Personal Income of Michigan" is the total income received by persons in Michigan from all sources, as defined and officially reported by the United States Department of Commerce or its successor agency. "Local Government" means any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government. "General Price Level" means the Consumer Price Index for the United States as defined and officially reported by the United States Department of Labor or its successor agency.

History: Add. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.

EXHIBIT D

PUBLIC HEALTH CODE (EXCERPT)
Act 368 of 1978

333.12753 Structures in which sanitary sewage originates to be connected to public sanitary sewer; approval; time.

Sec. 12753. (1) Structures in which sanitary sewage originates lying within the limits of a city, village, or township shall be connected to an available public sanitary sewer in the city, village, or township if required by the city, village, or township.

(2) Structures in which sanitary sewage originates lying outside the limits of the city, village, or township in which the available public sanitary sewer lies shall be connected to the available public sanitary sewer after the approval of both the city, village, or township in which the structure and the public sanitary sewer system lies and if required by the city, village, or township in which the sewage originates.

(3) Except as provided in subsection (4), the connection provided for in subsections (1) and (2) shall be completed promptly but not later than 18 months after the date of occurrence of the last of the following events or before the city, village, or township in which the sewage originates requires the connection:

(a) Publication of a notice by the governmental entity which operates the public sanitary sewer system of availability of the public sanitary sewer system in a newspaper of general circulation in the city, village, or township in which the structure is located.

(b) Modification of a structure so as to become a structure in which sanitary sewage originates.

(4) A city, village, or township may enact ordinances, or a county or district board of health, may adopt regulations to require completion of the connection within a shorter period of time for reasons of public health.

History: 1978, Act 368, Eff. Sept. 30, 1978.

Popular name: Act 368

EXHIBIT E

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.308a Action under Const. 1963, Art. 9, § 32; commencement; jurisdiction; limitations; governmental unit as defendant; officer as party; continuation of action against governmental unit and officer's successor; referral of action; findings of fact; costs. [M.S.A. 27a.308(1)]

Sec. 308a. (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.

(2) The jurisdiction of the court of appeals shall be invoked by filing an action by a taxpayer as plaintiff according to the court rules governing procedure in the court of appeals.

(3) A taxpayer shall not bring or maintain an action under this section unless the action is commenced within 1 year after the cause of action accrued.

(4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. If an officer dies, resigns, or otherwise ceases to hold office during the pendency of the action, the action shall continue against the governmental unit and the officer's successor in office.

(5) The court of appeals may refer an action to the circuit court or to the tax tribunal to determine and report its findings of fact if substantial fact finding is necessary to decide the action.

(6) A plaintiff who prevails in an action commenced under this section shall receive from the defendant the costs incurred by the plaintiff in maintaining the action.

History: Add. 1980, Act 110, Imd. Eff. May 13, 1980.

EXHIBIT F

MENTOR TOWNSHIP

OSCODA COUNTY

P.O. BOX 730
MIO, MICHIGAN 48647

PHONE (517) 826-5414
FAX (517) 826-8194

Harold Sprowl Jr.
200 Fairland
Mio, MI 48647

Re: 200 Fairland

Dear Mentor Property Owner;

This letter is to inform you that as of September 2001, Mentor Township passed an ordinance that will require all premises within 200 feet of the public sewer to connect to the sewer.

Your premise has been identified as not yet hooked up to the system and you are hereby notified that you are expected to take the necessary action to comply with the ordinance. If this information is incorrect please call the Utility office.

The Township will begin enforcing it's Big Creek-Mentor Public Water and Sewer Ordinance this spring. Violations of the ordinance are punishable by a $100 fine per day of violation and each day is considered one violation. We encourage you to take action now to get in compliance with the Ordinance.

The hook up fee is currently $1900.00 and as of August 1, 2002 the fee will increase to $2100.00. You will be receiving a letter near April 1, 2002 informing you that you have ninety (90) days to comply with the Ordinance. After the ninety (90) days you will be in violation of the Ordinance and subject to the penalties of the Ordinance.

When the Authority first started they offered financing of the hook up fee of $1500.00 over a 40 year period, and many people took advantage of that. The Authority Board is offering you the opportunity to take advantage of the same offer. You can finance the original $1500.00, however you must make a down payment to make your account equal to those who have paid their annual payments. With a down payment of $512.50 you will have an account balance of $1,387.50. Annual payments of approximately $125.00 are due the first of each year.

The Ordinance is necessary to ensure that all the people within the sewer district contribute to the success of the public sewer system. By enacting this ordinance the Township board feels that those who use, and have the advantage of the sewer system will be paying for it.

The Utility Authority office is open Tuesday and Thursday from 9:00 a.m. to noon at the Mentor Township hall. The phone number is 826-8750.

Sincerely,

Gary Wyckoff

Mentor Township

EXHIBIT G

001 540 058 70

Dear Big Creek Township Property Owner;

This letter is to inform you that as of last September the Big Creek Township Board passed an ordinance that will require all premises within 200 feet of the public sewer main to connect to the sewer system.

Your premise has been identified as not hooked up to the system and you are hereby notified that you are expected to take the necessary action to comply with the ordinance.

The hook up fee is currently $1900.00 per R.E.U. (Residential Equivalency Unit) and as of August 1, 2002 the fee will increase to $2100.00.

When the Authority first began they offered financing of the hook up fee of $1500.00 over a 30 year period, and many peoples took advantage of that. The Authority Board is offering you the opportunity to take advantage of the same offer. You can finance the your $1900.00 hook up fee but you must make a down payment to make the account equal to those who have paid their annual payments. With a down payment of $512.50 you will have an account balance of $1387.50 as of January 1, 2003.

The Township will begin enforcing it's Big Creek-Mentor Public Water and Sewer Ordinance this spring. You will be receiving a letter from the Township that will inform you that you will have 90 days to connect to the sewer system. Violations of this ordinance are punishable by a $100.00 fine per day of violation and each day is considered a new violation. We encourage you to take actions now to comply with the ordinance.

The Ordinance is necessary to make all the people within the sewer district contribute to the success of the public sewer system. Without full participation of all the people in the sewer district all the taxpayers of the Township have to contribute toward the operation of the system. By enacting this Ordinance the Township Board feels that those who use and have the advantage of the sewer system will be paying for it and the rest of the Township will not have to subsidize its operation.

The Utility Authority office is open Tuesday and Thursday from 9:00 a.m. to noon at the Mentor Township Hall. The phone number is 826-8750.

If you believe you have received this letter in error please contact Randy Booth at 989-826-2127 or P.O.Box 197 Luzerne Mi. 48636

EXHIBIT "H"

Court of Appeals, State of Michigan

ORDER

Dale L. Duverney v Big Creek Mentor Utility Authority

Docket No. 243866

Michael R. Smolenski
Presiding Judge

Joel P. Hoekstra

Jane E. Markey
Judges

The Court orders, pursuant to MCR 7.206(D), the complaint for relief under Const 1963, art 9, § 32 is DENIED for failure to state a cause of action where plaintiffs have failed to plead specific facts in support of their claimed violation of Const 1963, art 9, § 31, *Kramer v Dearborn Heights*, 197 Mich App 723, 725; 496 NW2d 301 (1993), and the documentation supplied by plaintiffs is insufficient to establish that a colorable claim exists, MCR 7.206(D)(1)(a). Plaintiffs' complaint and supporting documentation is wholly insufficient to persuade this Court that the challenged charges constitute a tax. *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998); *Graham v Kochville Twp*, 236 Mich App 141; 599 NW2d 793 (1999).

Michael R. Smolenski
Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 10 2003
Date

Sandra Schultz Mengel
Chief Clerk